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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

H2

FILE:

[REDACTED]

Office: LOS ANGELES

Date:

MAY 06 2009

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(h) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink that reads "Michael Shumway".

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, Los Angeles, denied the waiver application that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Colombia, the wife of a U.S. citizen, and the beneficiary of an approved Form I-130 petition. She was found to be inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act) for having been convicted of crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her husband.

The director concluded that the applicant had not demonstrated that denial of the waiver application would result in extreme hardship to a qualifying relative as described in section 212(h) of the Act and denied the appeal.

On appeal, counsel asserted that the evidence demonstrates that the applicant's husband would suffer extreme hardship if waiver is not granted.

Section 212(a)(2)(A) of the Act states, in pertinent part:

(i) In general. – Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of--

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . [is inadmissible].

(ii) Exception. – Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

1. The applicant was arrested, on December 1, 1991, in Burbank, California, and charged with a violation of section 459 CPC, burglary of a business. The applicant was subsequently convicted of a violation of section 487 CPC, grand theft, and sentenced to two days in jail, which sentence was suspended. The applicant was placed on three years probation. ([REDACTED])

2. The applicant was arrested, on January 26, 1993, in Glendale, California, using the name [REDACTED], and charged with a violation of section 459 CPC, burglary. On January 28, 1993, the applicant was convicted, pursuant to her plea of *nolo contendere*, of a violation of section 466 PC, possession of burglary tools. The applicant was placed on two years probation, with the first three days to be served in jail, but given credit for three days time served. [REDACTED]

3. The applicant was arrested, on August 27, 1995, in Tacoma, Washington, using the name [REDACTED] and charged with second degree theft. The applicant was subsequently convicted of that offense. She was sentenced to ten days in jail and placed on 12 months of community supervision. [REDACTED]

4. The applicant was arrested, on October 5, 1995, in Tacoma, Washington, using the name [REDACTED], and charged with theft. The disposition of that charge is unknown to the AAO, as is whether this charge is related to, or perhaps identical to, the charges in number 3, above.

5. The applicant was arrested, on March 30, 2001 or March 31, 2001, in Norwalk, California, using the name [REDACTED] for a violation of section 484(a) CPC, petty theft. On April 30, 2001 the applicant was convicted of that offense, pursuant to her plea of *nolo contendere*. The applicant was fined \$200 and placed on three years probation. [REDACTED]

An issue central to the decision in this matter is whether any of the applicant's convictions were convictions of crimes involving moral turpitude.

The general rule is that larceny, whether grand or petty, is a crime involving moral turpitude. *Pinol v. Nicolls*, 215 F2d 237 (1st cir. 1954), *Blumen v. Haff*, 78 F2d 833 (9th Cir. 1935). However, it is only a crime involving moral turpitude when the actor seeks to deprive the owner of his property permanently, rather than merely temporarily. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

In California, however, the intent to permanently deprive the owner of the property stolen is a necessary element of the crime of theft. *People v. Jaso*, 4 Cal. App. 3d 767 (1970). As the applicant was convicted of a theft offense in California, the conviction necessarily included a finding that the applicant intended to permanently deprive the owner of his property. The applicant's conviction of grand theft in number 1, above, and her conviction of petty theft in number 5, above, are both convictions of crimes involving moral turpitude.

Section 9A.56 of the Washington Criminal Code does not explicitly state that a conviction of theft pursuant to that statute requires the intent to permanently deprive the owner of his property. The AAO is unaware of any precedent case that indicates whether or not that intent is a necessary element of the crime. Whether that statute has ever been applied to conduct that did not include that intent is also unknown to the AAO. As such, the applicant's conviction of theft in Washington is not necessarily a conviction of a crime involving moral turpitude, and the AAO will not rely on the applicant's conviction in number 3, above, in this decision.

Possession of burglary tools is not a crime involving moral turpitude unless accompanied by an intent to commit a turpitudinous offense such as larceny. *U.S. ex rel Guarino v. Uhl*, 107 F2d 399

(2d Cir. 1939); *Matter of S-*, 6 I&N Dec. 769 (BIA 1955).

Section 466 of the California Penal Code covers possession of burglar tools “with intent feloniously to break or enter into any building, railroad car, *etc.* As such, it criminalizes possession of burglary tools if they are to be used in a crime, but do not specify that it must be a crime involving moral turpitude. Whether the applicant’s conviction in number 2, above, is a conviction of a crime involving moral turpitude is unclear to the AAO. Therefore, the AAO will not rely, in this decision, on the applicant’s conviction in number 2, above.

The applicant has committed two crimes involving moral turpitude, rather than merely one. Further, the applicant’s marriage certificate states that she was born on April 2, 1953. She was, therefore, over 18 years of age when she committed the crimes in numbers 1 and 5, above. For both reasons, she does not meet the requirements for an exception as set forth in section 212(a)(2)(A)(ii) of the Act, and is therefore inadmissible pursuant to Section 212(a)(2)(A)(i).

The balance of this decision will pertain to whether waiver of that inadmissibility is available and whether the applicant has demonstrated that waiver of that inadmissibility, if available, should be granted.

Section 212(h) of the Act provides, in pertinent part, that:

The Attorney General [now the Secretary of Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . if

(1)(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

The concept of extreme hardship to a qualifying relative “is not . . . fixed and inflexible,” and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a nonexclusive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of

fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

A waiver of inadmissibility under section 212(h) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's husband is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

In a letter dated March 25, 2004, the applicant's husband stated that he has suffered two heart attacks, was forced to retire early, and now depends on the applicant for care and transportation. He stated that he and the applicant love each other. He also stated that Colombia is very dangerous, but provided no evidence in support of that assertion.

The record contains a letter, dated March 18, 2005, from [REDACTED] Senior Mental Health Counselor at San Fernando Valley Community Mental Health Center, Inc. of Van Nuys, California, who stated that the applicant's husband has been a patient at that clinic since December 13, 2001, when he presented with "depressed mood, suicidal ideations, feelings of helplessness and hopelessness, impaired concentration, anxiety, poor memory, decreased energy level, lack of interest or enjoyment . . . and auditory hallucinations"

[REDACTED] further stated that the applicant's husband has reported anxiety and depression in nearly all of his bimonthly meetings with her, and that he has less tolerance for stress because of his losing his job and income and pending lawsuits somehow related to his job and income loss.

[REDACTED] reported that the applicant's husband has stated that he worries about everything and that, if not for the applicant, he would be dead. [REDACTED] reports that the applicant's husband has very little contact with his children and that the applicant has been his caretaker, helpmate, and friend and has not abandoned him, even as finances and health concerns have made life difficult. Finally, she stated that she suspects that without the applicant's assistance, the applicant's husband would decompensate and be at risk of further physical and mental decline and self-injury.

In a letter dated March 21, 2005, [REDACTED] added that during the previous four years the applicant's husband has been prescribed Risperdal, Wellbutrin, Buspar, and Trazodone, and that he was then on Wellbutrin and Buspar.

In a letter dated March 23, 2005, [REDACTED], a medical doctor, stated that the applicant's

husband has been his patient “for some time,” and suffers from coronary artery disease and Type 2 diabetes, which, although under control, has damaged his eyesight such that he cannot drive. [REDACTED] also stated that the applicant’s husband has difficulty taking his medications without his wife’s assistance, although he did not describe those difficulties. Finally, the doctor stated that control of the applicant’s husband’s lipids and diabetes are key to the applicant’s husband’s health and would be jeopardized by the loss of the applicant’s help and care.

A friend of the applicant stated, in a letter dated March 23, 2006, that she has known the applicant for five years and that she is kind, attentive, and responsive to her husband’s needs. She further stated that the applicant’s husband relies on the applicant’s support, including transportation.

A letter, dated March 23, 2006, from the president of a travel agency states that he has known the applicant and her husband for about five years and understands that the applicant has been responsible for driving her husband.

In her own declaration of March 23, 2006, the applicant stated:

After my husband’s two heart stroke, he not able to drive per doctor’s orders. His vision gets blurry at night. He is very nervous and often forgets things. I drive my husband to his doctor’s appointments and therapist’s appointments. I worry about him and his well-being. On April 2001, we went to the hospital because he had his first heart stroke. It was thereafter when he had another stroke. He is recuperating from that surgery and he still suffers from other medical conditions as a result of the accident.

[Errors in the original.]

She further stated, “Even though my husband has his daughters living in the United States, his daughters do not contact him even when he is at the hospital.”

The AAO is unable to find any other reference in the record to an accident, and the nature of the accident to which the applicant referred is unclear. The AAO does acknowledge that the evidence shows that the applicant’s spouse has had two heart attacks.

In the appeal brief, dated March 22, 2006, counsel reiterated that the applicant’s husband is 62 years old, has been seeing a mental health counselor since December 2001, has suffered two heart attacks and had two stents placed, has type 2 diabetes and a cholesterol level of 214, and is unable to drive. Counsel reiterated that the applicant’s son and daughters, his only relatives in the United States, are unavailable to assist him.

As to the applicant’s husband’s mental condition, counsel restated that he suffers from depressed mood, anxiety, poor memory, suicidal ideations, feelings of helplessness, and impaired concentration, is distressed about his situation, and stated that the applicant’s husband “is currently on various medications to help him control his mood and outlook such as Risperdal, Wellbutrin, Buspar, and Trazodone.” The AAO notes that the only independent evidence pertinent to mood drugs is the March 21, 2005 letter from [REDACTED]. That letter appears to indicate that, on that

date, the applicant's husband was taking Wellbutrin and Buspar, and that Risperdal and Trazodone had been tried previously, rather than that he was then taking all four drugs, as counsel implied.

Counsel further stated,

[The applicant's husband] has three U.S. Citizen Daughter [sic] and one U.S. Citizen Son. [The applicant's husband] does not know of the whereabouts of his son. Also, his daughters do not have a close father-daughter relationship. Even though [the applicant's husband] has tried contacting them, his daughters have not contacted for a while. The rest of [the applicant's husband's] family live in Canada.

Counsel did not address the possibility of the applicant's husband's hiring a nurse or someone in a similar capacity to see to his health needs. As to the applicant's finances, however, the record contains the joint Form 1040 U.S. Individual Income Tax Returns for the applicant and her husband for 2000, 2001, 2002, 2003, and 2004.

The 2000, 2001, 2002, 2003, and 2004 tax return show that the applicant and her husband had Line 22, Total income of \$24,942, \$17,926, \$15,159, \$16,690, \$25,894 during those years, respectively. A 2000 Form W-2 Wage and Tax Statement appears to indicate that the applicant's husband was working during that year. A 2001 W-2 appears to indicate that the applicant's husband was working during some portion of that year. The applicant's husband's income during 2002, 2003, and 2004 appears to have been derived chiefly from pensions and similar funds.

The evidence demonstrates that the applicant's husband has very serious physical and emotional health concerns. The evidence demonstrates that he depends on the applicant's assistance and that no other family member is available to serve his needs. The record demonstrates that the applicant's husband is not financially able to purchase that same assistance. The record demonstrates, therefore, that separating the applicant and her husband would cause severe hardship to the applicant's husband.

This decision will also address the possibility of the applicant's husband accompanying her to Colombia.

Counsel stated,

[The applicant's husband] cannot go to Colombia with the Applicant because in Colombia he will not be able to get any medical care for his medical conditions [and] this will have a severe impact on his emotional and physical health.

Counsel did not further explain his assertion that the applicant's husband would be unable to obtain medical care in Colombia. The record contains no evidence that medical attention is unavailable in Colombia or that the attention available there is insufficient to serve the applicant's husband's needs. Counsel has not demonstrated that accompanying the applicant to Colombia would pose any hardship pertinent to the applicant's husband physical or emotional health.

Counsel stated,

[The applicant's husband] cannot work in Colombia because he is elderly. Even if the Applicant could work, the average wage in Colombia is \$152 per month. They could not feed themselves in Colombia on this type of wage.

Counsel provided a printout of content from a website maintained by the U.S. Department of Labor at <http://www.dol.gov/ilab/media/reports/oiea/wagestudy/FS-Colombia.htm>. That content states that "The 1999 monthly minimum wage is 236,440 Colombian approximately 152 U.S. dollars . . ." Although counsel dated that brief March 22, 2006, he provided no more recent information.

Counsel provided no evidence to support his assertion that the average wage paid in Colombia is insufficient to sustain the applicant and her husband there. The AAO notes that the applicant and her spouse are not dependent on income derived from employment. Counsel stated, [The applicant's husband] currently receives social security and retirement pension benefits." Counsel did not state the amount of the applicant's husband's social security payments or his retirement pension payments, and provided no evidence to support that the applicant's husband would be unable to receive them in Colombia or that they would be insufficient to sustain the applicant and her husband in Colombia. Counsel has not demonstrated that accompanying the applicant to Colombia would pose any financial hardship to the applicant's husband.

Finally, although the applicant's husband stated that he understands that life in Colombia is dangerous, no evidence was adduced to support that understanding. The record does not show that the applicant's husband's life, if he moved to Colombia, would be sufficiently dangerous to constitute a hardship.

The record demonstrates that the applicant has a very loving and devoted husband who is extremely concerned about the prospect of the applicant's departure from the United States. Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances.

In nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "*extreme* hardship," Congress made plain that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist.

Separation from one's spouse or child is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the standard in INA § 212(i), the hardship must be greater than the normal, expected hardship involved in such cases.

U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96

F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). “[O]nly in cases of great actual or prospective injury . . . will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship.

The U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under INA § 212(h), 8 U.S.C. § 1186(h) and that waiver is therefore unavailable. Because the applicant has been found statutorily ineligible, the AAO need not address whether the applicant merits waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

ORDER: The appeal is dismissed.